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No. 742

In the Supreme Court of the United States

OCTOBER TERM, 1961

TONY CAMPOS MEJIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) has not yet been reported.

JURISDICTION

The order of the court of appeals denying leave to file a petition for a writ of mandamus was entered on December 19, 1961 (Pet. App. A). The petition for a writ of certiorari was filed on February 2[illegible]

1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals properly refused to consider, on an application for a writ of mandamus, the issue of whether two counts of an indictment should be dismissed before trial for delay in return of those counts.

STATEMENT

In 1957, petitioner was convicted in the United States District Court for the Southern District of California of the transportation of unlawfully imported marihuana on February 20, 1957. Petitioner was sentenced to imprisonment for twenty years. On June 14, 1961, the court of appeals, on the basis of the showing made by petitioner on a motion for a new trial, set aside the conviction and ordered a new trial. 291 F. 2d 198.

On September 13, 1961 a superseding indictment was returned against petitioner. Count 1, alleging a transaction in *marihuana* on February 20, 1957, was identical with that on which petitioner had previously been convicted and a new trial ordered. Counts 2 and 3 charged the sale and concealment of *heroin* on March 20, 1957. Petitioner moved to have counts 2 and 3 of the superseding indictment dismissed under Rule 48, F.R. Crim. P., on the ground that the delay in bringing those charges was unreasonable and in violation of petitioner's right to a speedy trial. In

the course of argument on the motion, the trial court noted that California state charges, based on the herein transaction of March 20, 1957, had been dismissed after petitioner's conviction for the marihuana offense in 1957 because petitioner was then serving a federal sentence (R. 4-10). The court was of the view that the government had no reason to present a federal indictment based on such a transaction while petitioner's conviction for the earlier marihuana offense was outstanding. It accordingly denied the motion to dismiss (R. 19-20).

Petitioner then sought to have the court of appeals issue a writ of mandamus ordering the district court to dismiss counts 2 and 3. The court of appeals denied leave to file the petition.

ARGUMENT

The merits of the district court's order denying the motion to dismiss counts 2 and 3 of the indictment can be reviewed if petitioner is convicted and sentenced on those counts. The court of appeals properly declined to grant what would be in effect an interlocutory appeal by considering the issue on a petition for a writ of mandamus. *Price* v. *United States*, 271 U.S. 513, 520; *Bankers Life and Casualty Co.* v. *Holland*, 346 U.S. 379, 383-385; *Roche* v. *Evaporated Milk Association*, 319 U.S. 21. There are no special circumstances which would justify the extraordinary relief of mandamus, or the granting of a piecemeal appeal in a criminal case. *See Cobbledick* v. *United States*, 309 U.S. 323.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.

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